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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

PIERRE MISTROT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
E. B. DUBUISSON,
EDWARD DUBUISSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY,

vs.

PIERRE MISTROT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

Petitioner, The Pennsylvania Railroad Company, respectfully prays for a writ of certiorari to the Court of Appeal of Louisiana, First Circuit, to review the judgment entered therein on December 12, 1940, a petition for a writ of certiorari to that Court having been denied by the Supreme Court of the State of Louisiana on March 3, 1941.

Summary Statement.

This is an action by a common carrier to recover from the respondent (the consignor-defendant below) its lawful freight charges for the transportation of two consignments of cabbage from Arnaudville, Louisiana, to Pittsburgh, Pennsylvania, upon bills of lading issued April 28, 1934, in

which P. G. Sackenreuther was named as consignee, and which contained the following, among other conditions:

> "7. * * * The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor * * * shall not be liable for such charges, * * *"

On the face of the bills of lading was printed:

> "Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." (R. 24A-24D.)

The respondent (consignor-defendant) did not sign this latter statement (R. 24A-24D).

Upon instructions received from said consignee that the shipments be delivered to Tom Ayoob Company upon payment of the freight charges, petitioner made delivery to said nominee of the consignee and received two checks in payment of the freight charges, aggregating $571.53, both of which were dishonored (R. 1-13).

No payment on account of said freight charges having been made, petitioner instituted suit against the respondent-consignor in the Twenty-seventh Judicial District Court, St. Landry Parish, Louisiana, on October 26, 1936 (R. 1-4), and at the trial submitted its case on the pleadings (R. 15). Respondent (defendant below) averred and gave evidence tending to prove that the owner of the cabbage was said

P. G. Sackenreuther, to whom he had sold it; that he shipped it upon Sackenreuther's instructions and that the agent of the initial carrier knew these facts (R. 11-15, 18-22).

The Court rendered judgment for the respondent September 28, 1940 (R. 25-35). On appeal to the Court of Appeal of Louisiana, First Circuit, this judgment was affirmed December 12, 1940 (R. 38-44). Application for a rehearing was denied January 14, 1941 (R. 44), and petition for a writ of certiorari was denied by the Supreme Court of the State of Louisiana on March 3, 1941 (R. 45).

Question Presented.

This case involves the obligations, rights and duties of the consignor and common carrier of interstate shipments of goods under contracts of shipment which required the respondent (consignor), although known not to be the owner of the goods, to pay the lawful established charges for the transportation thereof in the absence of a signed stipulation upon the bills of lading requiring collection from the consignee before delivery.

Reason for Allowance of the Writ.

The case raises an important question of Federal Law governing interstate commerce affecting shippers and carriers throughout the country and the application and interpretation of the provisions of the uniform bill of lading approved by the Interstate Commerce Commission, which the Courts of Louisiana have misconceived and misapplied in their attempted construction of the leading case of *Louisville & Nashville Railroad Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59-70, 68 L. Ed. 900, which involved a different form of bill of lading. The effect of the decisions complained of is to relieve the consignor who was initially and primarily responsible for the lawful freight charges from

his contractual obligation and to prevent the carrier from performing its duty under the Interstate Commerce Act as established by the decisions of this Honorable Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeal, First Circuit, of the State of Louisiana, and that the judgment of that Court may be reversed and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

THE PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
E. B. DUBUISSON,
EDWARD DUBUISSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The petition for a writ of certiorari to the Court of Appeal of Louisiana, First District, was denied by the Supreme Court of the State of Louisiana March 3, 1941 (R. 45).

The opinion of the Court of Appeal of Louisiana, First District, was rendered December 12, 1940 (R. 38-44).

The opinion of the Trial Court, the Twenty-seventh Judicial District Court, St. Landry, Louisiana, is printed in the Record at pages 25-35, inclusive.

Jurisdiction.

The judgment of the Court of Appeal of Louisiana, First Circuit, here sought to be reviewed, was entered December 12, 1940 (R. 38-44). Application for rehearing was denied January 14, 1941 (R. 44). Petition for a writ of certiorari was duly filed in the Supreme Court of the State of Louisiana and was denied by that court March 3, 1941 (R. 45).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344 (b); Rule 38, Sup. Ct. U. S.).

Statement.

The principal facts are set forth in the petition, *supra*, pp. 1-2.

Specifications of Error.

It is submitted that the Court of Appeal of Louisiana, First Circuit, erred:

1. In affirming the judgment of the Twenty-seventh Judicial District Court, St. Landry, Louisiana, and misconstruing and misinterpreting applicable decisions of this Court.

2. In permitting parol evidence as to the ownership of the goods and the initial carrier's knowledge of such ownership to contradict and modify the terms of the bill of lading contracts.

3. In refusing to hold that the bills of lading constituted the controlling contract and that all parol or prior understandings were merged in the written contracts of shipment.

4. In holding that a carrier, by its subsequent conduct, may release a shipper or consignor from his express obligation to pay the lawful transportation charges on an interstate shipment.

5. In holding that the consignor of a shipment who is not the owner of the goods (of which fact the carrier had knowledge) but who has expressly assumed the primary obligation to pay the lawful transportation charges, becomes only secondarily liable, if liable at all, when the consignee, as owner, accepts and receives the shipments from the carrier or directs their delivery to another.

6. In holding that the consignor could be only secondarily liable under the circumstances cited in paragraph 5 and that his liability was contingent upon the carrier exhausting all means of collecting the lawful charges from the consignee's nominee as well as from the original consignee.

Statutes Involved.

The statute involved is the Interstate Commerce Act of February 4, 1887, as amended, particularly Sections 1, 2, 6 and 20 (11), 49 U. S. C. A., Sections 1, 2, 6 and 20 (11).

ARGUMENT.

I.

The consignor is primarily liable for the freight charges.

Aside from the requirements of the bills of lading here involved, the consignor is primarily liable for the payment of freight charges. In *L. & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 67, the court said:

> "Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer."

Moreover, it has been generally held that a consignor is liable for freight charges even though he may not be the owner of the goods. *Portland Flouring Mills Co.* v. *British & F. M. Ins. Co.*, 103 Fed. 860, 864.

In *L. & N. R. Co.* v. *Central Iron & Coal Co., supra*, this Court went on to point out that the parties are left free to contract as to the liability for freight charges, saying at page 66 of the opinion:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

Therefore, when determining what liability has been assumed for the payment of the freight charges, resort must

be had to the contract. Thus in the cited case, the Court said, at page 67:

> "We must, therefore, determine what promise, if any, to pay freight charges was, in fact, made by the Central Company.
>
> "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract."

The provision with respect to the payment of the transportation charges as it is set forth in the bills of lading under which the present shipments moved is contained in Section 7 thereof, the applicable portion of which reads:

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. *The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges* and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor * * * shall not be liable for such charges. * * *." (R. 24A-24D). (Italics supplied.)

On the face of the bills of lading, the following was printed:

> "Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

"The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges" (R. 24A-24D).

The consignor (respondent here and defendant below) signed the bills of lading, but did not sign the non-recourse statements thereon (R. 24A-24D).

The bill of lading provision specifically making the consignor liable for freight charges was approved by the Interstate Commerce Commission in *In The Matter of Bills of Lading,* 52 I. C. C. 671, 721, decided April 14, 1919.

II.

The bills of lading are the sole evidence of the agreement of the parties.

The bills of lading are written contracts and constitute the agreement between the parties. Their terms can not be altered or varied by parol evidence. All prior negotiations are merged into the written agreement. This has been expressly so held in *Portland Flouring Mills Co.* v. *British & F. M. Ins. Co., supra,* where the Court said, at page 863:

"In the present case the intention of the parties was clearly expressed in the bill of lading. There was nothing of an equivocal or ambiguous character contained therein, and there were no words used which required any oral testimony as to their true meaning. In all such cases it is manifest that 'the rights of the parties are fixed by the bill of lading, and the evidence of conversations prior to the date of it cannot have any effect to vary its provisions.' O'Rourke *v.* 221 Tons of Coal (D. C.) 1 Fed. 619, 624. 'The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract.' The Golden Rule (C. C.) 9 Fed. 334. 'Such a contract is to be construed, like all other written contracts, according to

> the legal import of its terms. It becomes the sole evidence of the undertaking, and all outstanding agreements are extinguished by the writing.' Louisville, E. & St. L. R. Co. *v.* Wilson (Ind. Sup.) 21 N. E. 343, 4 L. R. A. 244. See, also, Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.) 23 S. W. 299."

See also *Missouri-Pacific R. Co.* v. *Sorrell,* 21 F. Supp. 886, wherein the court said at page 888:

> "To hold that the express provisions of the bill of lading signed by the respective parties can, in the absence of a showing of fraud, be varied by evidence of prior or contemporaneous parol agreements would be to open the door to all of the attendant evils which the original parol evidence rule was intended to avoid. The hardship that may occasionally fall upon an individual shipper by reason of the enforcement of this rule will in no way offset the evil that would result from the complete relaxation of it asked by the defendant in this case. It is perfectly obvious under the decisions that the consignor or shipper, at the time of making the shipment, can thoroughly protect himself by incorporating a provision against liability in the written contract."

The parties to a contract of interstate shipment cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations. *Georgia, Fla. & Ala. Ry.* v. *Blish Co.,* 241 U. S. 190.

Nor can an interstate carrier estop itself from enforcing payment from one who has assumed liability for the transportation charges. Thus at page 65 of its decision in *L. & N. R. Co.* v. *Central Iron & Coal Co., supra,* this court said:

> "No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor

could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

III.

The cases cited by the Court of Appeal of Louisiana fail to support its decision.

L. & N. R. Co. v. *Central Iron & Coal Co., supra,* is cited by the Court of Appeal as supporting its decision but, in fact, it upholds the contentions of petitioner. It is specifically stated in the *Central Iron & Coal Co.* case that in order "to ascertain what contract was entered into we look primarily to the bills of lading * * *." It is also stated therein that "there was no clause by which the shipper agrees expressly to pay the freight charges or to guarantee their payment." Since the movement of the shipments in the *Central Iron & Coal Co.* case, the provisions of the bill of lading have been changed so as to include an express provision making the consignor liable for the freight charges, but giving him a means of avoiding such liability if he so desires (see marginal note 3 at page 66 of the *Central Iron & Coal Co.* decision). This express provision was in the bills of lading covering the present shipments and respondent did not avail himself of the opportunity to escape such liability. There is this further important difference between the *Central Iron and Coal Co.* case and the instant case. The decision in the *Central Iron & Coal Co.* case discloses (p. 68) that the Central Iron & Coal Co. did not sign the bills of lading, "nor was it described therein as the consignor." Here respondent did sign the bills of lading in his own name as shipper.

Since the adoption of the uniform bill of lading containing the express contractual provision as to consignor liability, the courts have uniformly held that a consignor is

primarily liable for the freight charges unless he signs the non-recourse provision on the face of the bill of lading:

Atchison, T. & S. F. Ry. Co. v. *Hunt Bros. Fruit Co.*, 34 F. (2d) 582;

Pennsylvania R. Co. v. *Marcelleti*, 256 Mich. 411, 240 N. W. 4;

New York Central R. Co. v. *Frank H. Buck Co.*, 2 Cal. (2d) 384, 41 P. (2d) 547;

Pennsylvania-Reading Seashore Lines v. *Unit Const. Co.*, 117 N. J. L. 494, 189 A. 376 (N. J.);

New York, N. H. & H. R. Co. v. *California Fruit G. Exch.*, 125 Conn. 241, 5 A. (2d) 353;

N. Y. C. R. R. v. *J. B. Berry Sons' Co.*, 338 Pa. 500, 12 A. (2d) 588.

Yazoo & M. V. R. Co. v. *Zemurray*, 238 Fed. 789, and *St. Louis-San Francisco Ry. Co.* v. *Republic Box Co.*, 12 F. (2d) 441, are likewise relied upon by the State court. In both of these cases there was no express provision in the bills of lading, as here, that the consignor was liable for the transportation charges. Comment is made in *Missouri-Pacific R. Co.* v. *Sorrell, supra,* that such a provision was not in the shipping contracts in the *Central Iron & Coal Co.* case, and in the *Republic Box Co.* case.

It is respectfully submitted that the writ of certiorari should be issued, as prayed.

THE PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC D. McKENNEY,
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THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner,*

v.

PIERRE MISTROT.

ANSWER TO RESPONDENT'S REPLY BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

THE PENNSYLVANIA RAILROAD COMPANY,

By FREDERICK D. McKENNEY,
JOHN S. FLANNERY,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1941.

No. 116.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

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PIERRE MISTROT.

ANSWER TO RESPONDENT'S REPLY BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

PRELIMINARY STATEMENT.

The confusion of the issue created by respondent's reply brief makes this short answer essential.

This is not an action for the amounts of two dishonored checks, as respondent contends, but an action to recover from the respondent consignor transportation charges on two interstate shipments, pursuant to the provisions of the bills of lading, wherein the consignor became primarily

liable for such freight charges in the absence of his signature to the non-recourse provision of the bills of lading. (R. 1-10, 24A-24D)

I.

The Consignor is Primarily Liable for the Freight Charges.

Respondent admits, as contended by petitioner, that the consignor is primarily liable for the payment of freight charges, but states that a question of fact was presented in the Court of first instance as to whether respondent was "the consignor or shipper, or whether P. G. Sackenreuther, the owner of the cabbage shipped was the consignor." (Reply Brief, p. 4.)

Respondent having signed the original bills of lading in each instance as "shipper" or consignor (Test. R. 20, 24A-24D), no question was raised below as to whether or not respondent was the consignor. Respondent, however, did contend that he was not the *owner* of the produce shipped, but as set forth at page 7 of petitioner's original brief in support of the petition, the question of ownership is absolutely immaterial to the issue involved.

Respondent also lays great stress upon the written orders of P. G. Sackenreuther, the original consignee, directing the carrier to deliver the shipments to Tom Ayoob Company, the notify consignee, upon "payment of freight charges". This direction by the consignee could in no wise affect the primary responsibility of the consignor for the payment of the freight charges under the provisions of the bills of lading, which he signed. Moreover, it has been frequently held that such orders do not relieve even the consignee who gave them from the ultimate payment of the freight charges. *N. Y. Central R.R. Co.* v. *Warren Ross Lumber Co.*, 234 N. Y. 261, 137 N. E. 324, and *N. Y., N. H. & H. R.R. Co.* v. *California Fruit Growers Exchange*, 125 Conn. 241, 5 Atl. 2nd 353, and cases therein cited,—certiorari denied 308 U. S. 567. Respondent consignor was given the opportunity to protect himself against liability for the payment of freight charges by signing the non-recourse

clause on the face of the bills of lading, but he failed to take advantage of this protection afforded him and cannot now be heard to complain.

Interstate Commerce Commission's order misquoted.

Petitioner is accused of overlooking certain rules and regulations of the Interstate Commerce Commission respecting the collection of freight charges and respondent calls the Court's attention in the following language to a general order of the Commission dated January 20, 1931:

> "We respectfully call this Court's attention to the fact that the Interstate Commerce Commission's order in proceeding entitled 'Regulations for the Payment of Charges', 171 I. C. C. 268, provides:
>
> " 'Checks, drafts or money orders, WHICH ARE SATISFACTORY TO THE CARRIER, in payment of freight charges within the credit periods allowed such shipper, may be deemed to be the collection of tariff charges within the credit period for the purposes of these rules.' " (Reply Brief, 6-7)

Certainly no further reply to respondent's argument based upon this order need be made other than to point out that the paragraphs of the Commission's order immediately preceding the above quotation deal with the computation of the periods of credit which carriers may allow consignees for the payment of freight charges, and that the full sentence of the order referred to by respondent, correctly quoted, reads as follows:

> "The *mailing* by the shipper of *valid* checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purpose of these rules." (171 I. C. C. 268, 282, Italics supplied)

Respondent also places much emphasis upon the decision of this Court in *Fullerton Lumber Company* v. *Chicago, M., St. P. & P. R. Co.*, decided February 24, 1931, 282 U. S. 520, 51 Sup. Ct. 227, wherein this Court held that the carrier could not recover from the consignee where a *valid* check had been given by the consignee in payment of freight charges but was not collected when presented for payment after considerable delay on the part of the carrier because of the intervening failure of the bank on which the check was drawn.

The irrelevance of that case is obvious when it is recalled that in the instant case the carrier's suit is based upon the contracts of shipment against the consignor who was in no way connected with the *invalid* checks given to the carrier by the notify consignee. Respondent could certainly not seriously urge that the receipt of such invalid checks from the consignee, a co-obligor, would constitute "payment" of the freight charges and thereby destroy the primary obligation of the consignor to pay such charges under his contracts of shipment.

Respondent quotes the following paragraph from the Court's opinion in the *Fullerton Case:*

> "Whether, in the case at Bar, the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of Law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us." (Reply Brief, p. 8)

Again, this quotation takes on an entirely different meaning when considered in the light of the sentence which immediately precedes it, reading as follows:

> "* * * There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank *in which the drawer has an ample deposit.*" (282 U. S. 520, 522, Italics supplied)

It should also be mentioned at this point that respondent purports to quote further from the opinion in the *Fullerton case* at pages 11-12 and 15 of his reply brief, as follows:

> "Carrier accepting check for freight charges held not relieved from loss resulting from delay in presenting check, by general requirement that carrier charges must be paid in money."

but no such statement is found in the Court's opinion.

II.

The Bills of Lading Are the Sole Evidence of the Agreement of the Parties.

Respondent admits "that bills of lading are written contracts and that their terms cannot be altered or varied by parole evidence, save and except where fraud or error induced by the agents of the plaintiff or by agreement in writing," (reply brief, p. 10) and no such fraud or error induced by the plaintiff or agreement in writing signed by the respondent is alleged or proved. This leaves respondent primarily liable for the payment of the freight charges pursuant to the unequivocal provisions of the bills of lading.

Chicago & E. I. R. Co. v. Collins Produce Company.

Respondent refers to this Court's opinion in *C. & E. I. R. Co.* v. *Collins Produce Company*, 249 U. S. 186, 39 Sup. Ct. Rep. 189, saying:

> "The Golden Rule for carriers is set forth by Justice Clarke in the case of the *Chicago and E. I. R. Co.* v. *Collins Produce Company*, 249 U. S. 186, 39 Sup. Ct. Rep. 189, as follows:
>
> " 'The relation of carrier to shipper so partakes of a fiduciary capacity as to require the utmost fairness on its part in dealing with the shipper and in the discharge of its duties to him; and the reason for this trust and confidence which must be sustained is based upon commercial necessity and public policy.' " (Reply brief, p. 10)

In that case, this Court held that a carrier could not successfully defend a suit by the shipper for failure to deliver certain perishable goods upon the ground that such failure was "caused by the act of God * * * or the authority of law", alleging that the produce had been appropriated by the military authorities in a flood area under martial law, where the fact was, as found by the jury, that the carrier had solicited the appropriation by the military authorities upon the false and unjustified representation that the fowls were abandoned by their caretaker and dying. Despite the complete lack of similarity between the two cases, respondent purports to set forth the "Golden Rule" prescribed for carriers in the *Chicago & E. I. R. Co. Case*, as above quoted, but the quotation is not found in the opinion.

III.

The Cases Cited by the Court of Appeal of Louisiana Fail to Support Its Decision.

Respondent strenuously urges that the Court of Appeal of Louisiana properly relied upon the decision of this Court in *L. & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59. However, the very language of this Court's opinion in the *Central Iron & Coal Co.* case distinguishes that case from the one at bar. There the Court said:

> "In this case, the bills of lading acknowledge receipt of the coke from the Central Company. But *it did not sign them.* Nor was *it described therein as the consignor. There was no clause by which the shipper agrees expressly either to pay the freight charges or to guarantee their payment.* The goods received were not declared to be deliverable to the Central Company's order. On the contrary, the form of the bills of lading indicated that it was neither the owner nor the person on whose behalf the shipment was being made; and that Tutwiler & Brooks were either the owners or the persons in whose behalf the shipment was being made. On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges."

This Court thus clearly indicated that if the Central Company had signed the bill of lading as shipper or consignor and the bill of lading contained a clause by which the shipper expressly agreed to pay the freight charges, as in the instant case, the Central Company would have been primarily liable for the freight charges.

IV.

Federal Question Presented.

Respondent at page 16 of his reply brief quotes from *Southwestern Bell Telephone Company* v. *State of Oklahoma, et al.*, 303 U. S. 206, and urges that petitioner has failed to show that a Federal question was presented for decision to the Court below in this case.

This suit was brought to recover freight charges on interstate shipments and involves the interpretation of the uniform bill of lading used by rail carriers throughout the United States, which this Court has many times said presents a Federal question reviewable by this Court.

In *C., C., C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, this Court, in referring to a controversy arising under bills of lading, with particular reference to the limitation of liability provisions, said:

> "* * * But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 672; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 180."

In *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327, this Court said:

> "We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act."

Again, in *Louisville & Nashville R.R. Co.* v. *Rice*, 247 U. S. 201, 203, this Court said:

> "* * * As to interstate shipments 'there can be no question that, since the decision in the *Croninger Case* [226 U. S. 491], the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligations.' *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 595; *Louisville & Nashville R.R. Co.* v. *Maxwell*, 237 U. S. 94, 97."

Despite the unequivocal allegation contained in plaintiff's petition in the District Court "that defendant made himself liable for the transportation charges on this freight shipment under Section 7 of the terms of the bill of lading contract," (R. 1, 2), the Louisiana Court of Appeal erroneously interpreted the provisions of the bills of lading involved in the instant case in a manner which if it remain the law of Louisiana, would give the consignors in that State a preference over the consignors in other states, and destroy the uniformity which the Interstate Commerce Act was designed to create and maintain.

It is again respectfully submitted that the writ of certiorari should be issued, as prayed.

THE PENNSYLVANIA RAILROAD COMPANY,

By FREDERICK D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
E. B. DUBUISSON,
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Counsel for Petitioner.

FILED
JUL 10 1941
CHARLES ELMORE CROPLEY
CLERK

(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY

vs.

PIERRE MISTROT.

REPLY BRIEF OF PIERRE MISTROT IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

WADE O. MARTIN, JR.,
L. AUSTIN FONTENOT,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY

vs.

PIERRE MISTROT.

BRIEF IN OPPOSITION TO APPLICATION OF PLAINTIFF FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

Plaintiff alleges that this case raises a question of Federal Law governing the proper application and interpretation of the uniform bill of lading approved by the Interstate Commerce Commission, and which, plaintiff says, the Court of Louisiana have misconceived and misapplied.

We submit that a reading of the record will show that these allegations made by the plaintiff in its petition are fictitious, and if in good faith, are made on a misconception and misapplication of the facts and issues submitted to the Courts of Louisiana.

The Writ herein prayed for should be refused for the reason that the facts of the case, as shown by the record, entirely fails to disclose or involve an action or controversy properly within the jurisdiction of this Court.

The issue of facts presented to the Courts of Louisiana, and upon which the State Court passed, boiled down, means

nothing more nor less than this: Can the plaintiff, in a suit filed on October 24, 1936, and without previous notice to the defendant as to the true nature of its demand, recover of the defendant the aggregate amount of two checks dated May 10th and May 11th, 1934, and alleged to have been received by plaintiff from Tom Ayoob Company, who was neither consignor nor consignee, in payment of freight charges on shipment covered by the bills of lading and to whom plaintiff delivered the freight on two orders reading as follows:

"DELIVERY ORDER.

April 30, 1934.

Freight Agent, Pennsylvania Lines, Pittsburg, Pennsylvania.

DEAR SIR:

(fol. 3) On surrender of this letter and PAYMENT OF FREIGHT CHARGES, please deliver to Tom Ayoob Company, or bearer, Car PFE-28010, cabbage shipped from Arnaudville, Louisiana by P. Mistrot and billed to P. G. Sackenreuther advise Tom Ayoob Company on arrival.

Yours truly,

(Signed) P. G. SACKENREUTHER."

PGS:LP.

"DELIVERY ORDER.

April 30, 1934.

Freight Agent, Pennsylvania Lines, Pittsburg, Pennsylvania.

DEAR SIR:

On surrender of this letter and PAYMENT OF FREIGHT CHARGES, please deliver to Tom Ayoob Company, or bearer, car PFE-27141, cabbage shipped from Arnaudville, Louisiana, by P. Mistrot and consigned to P. G. Sackenreuther, advise Tom Ayoob Company on arrival.

Yours truly,

(Signed) P. G. SACKENREUTHER."

See Printed Transcript of Record Pages 2 and 3.

The Twenty-Seventh Judicial District Court, St. Landry Parish, La., held under the facts presented to it that the defendant was not liable to the plaintiff because *he* had been relieved of liability by acts and omissions of the Railroad Company. See printed Transcript of Record, Page 35.

The Louisiana Court of Appeals, First Circuit, all Judges concurring, affirmed the ruling of the lower court for, among other reasons, because the plaintiff had failed to show that it had exhausted all means of collecting the checks from the Tom Ayoob Company. See printed Transcript of Record, Page 44.

The Louisiana Supreme Court, with all facts before it, refused the Plaintiff a Writ of Certiorari in these words: "Writ refused—judgment correct."

When we call the attention of this Court to the fact that the first demand made on the defendant was dated August 13, 1935, one year, three months and three days after the date of the checks alleged to have been given by Tom Ayoob Company in payment of the freight, and the further fact that the letter from the Assistant General Solicitor making the demand and shown in the printed Transcript of Record at Pages 22 and 23, did not even advise defendant that a claim was being made against him because of the alleged non-payments of checks given in payment of freight and that it was only in plaintiff's petition filed two years, five months and fourteen days after date of checks that he had notice that the checks given in payment of freight had not been paid by the unnamed Bank upon whom they were supposed to be drawn, and that the defendant does not yet know, nor do the pleadings or evidence show, who signed the alleged checks, their date, upon what Bank or Banks they were drawn, and for what reason the Bank refused to pay them, that any argument should be necessary to establish that the decisions of the Louisiana Courts in

this case rests on an adequate non-Federal ground and that this Court is without jurisdiction.

Our further argument is to unravel and make clear what we consider to be a misconception and misapplication of the facts by the plaintiff in its petition and brief filed in this case.

We, therefore, take up the points raised in plaintiff's brief in the same order in which the argument is made for the plaintiff.

I.

The consignor is primarily liable for the freight charges.

No one contended in the State Courts that the consignor was not primarily responsible for the freight charges. Nor does either of the State Courts, in their decisions in this case, hold otherwise.

There was raised in the State Court the question as to whether or not the defendant, Pierre Mistrot, was in truth and in fact the consignor or shipper, or whether P. G. Sackenreuther, the owner of the cabbage shipped was the consignor.

The plaintiff alleged in its petition that the defendant was the shipper, but the defendant, in his answer, denied these allegations and in his answer, verified by oath, alleged the true facts to be that he had no interest in the transaction, and that with the full knowledge of the Railroad Company, that he was shipping the cabbage on instructions from P. G. Sackenreuther, Produce Merchant of Houston, Texas, the owner of the cabbage, and that the bill of lading was signed by the defendant because the Railroad Agent, to whom he had explained all of the facts, presented him, for his signature, the bill of lading; or, in other words, the Railroad Agent knew that the cabbage belonged to Sackenreuther and not to the defendant.

A reference to the printed record will show that the defendant verified in person, under oath, the allegations of his answer and that the plaintiff's petition is verified by one of its attorneys "to the best of his knowledge, information and belief". See printed Transcript Pages Four and Fifteen.

We wish to further call the attention of the Court to the fact that the plaintiff offered no evidence at all on the trial of its case, and contented itself with the statement that, "plaintiff rests its case upon the pleadings".

It is true that one of the attorneys of the plaintiff was placed on the witness stand, but he was called, not by the plaintiff, but by the defense.

It will be seen that even plaintiff's attorney did not have with him the two checks alleged upon in Paragraph VIII of plaintiff's petition, and that he did not know anything about Tom Ayoob Company, from whom the checks had been received. See printed Transcript, Page 16.

On the other hand, the defendant took the stand and under oath made good the averments of his answer. See printed Transcript, Pages 18, 19, 20, 21 and 22.

He who alleges a fact must prove it. The plaintiff alleged that the defendant was the shipper of the freight. See printed Transcript of Record, Page 1.

The defendant denied the allegations of the plaintiff. See printed Transcript of Record Page 11.

The plaintiff, in submitting its case "on the pleadings", did not measure up to the rule of proving its allegations and was left entirely dependent on evidence offered by the defendant. This is true both as to whom was "shipper" and whether the freight was paid on dishonored checks.

On the facts the plaintiff failed to make out its case.

The brief of the plaintiff, in seeking to convince the Court, quotes from the *L. & N. R. Co.* v. *Central Iron and Coal Company,* the following language:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

If this statement be correct, and we believe it is, then and in that event the plaintiff is met face to face with the orders of April 30, 1934, authorizing the Railroad Company to deliver the cabbage, on payment of freight charges, to Tom Ayoob Company.

There is no doubt that this written order was the basis of the delivery and the acceptance of checks in payment of freight, if the checks were ever actually received by the plaintiff. At all events, the plaintiff did act on the written order to turn over the cabbage to Tom Ayoob Company on payment of freight charges.

The plea made to this Court is that jurisdiction is vested with the court to review the judgment rendered by the Louisiana courts because forsooth the Louisiana courts misconstrued the application and interpretation of the provisions of the uniform bill of lading approved by the Interstate Commerce Commission and yet plaintiff, in its brief, entirely overlooked the rulings of the Interstate Commerce Commission establishing rules and regulations for the payment of freight charges.

We respectfully call this Court's attention to the fact that the Interstate Commerce Commission's order in proceeding entitled, "Regulations for the Payment of Charges", 171 I. C. C. 268, provides:

> "Checks, drafts or money orders, WHICH ARE SATISFACTORY TO THE CARRIER, in payment of freight charges within the credit periods allowed such shipper, may be deemed to be the collection of tariff

charges within the credit period for the purposes of these rules."

We further quote from the Regulations of the Commission in the aforesaid order, which seems to have been overlooked by the plaintiff, or at least, in its brief; viz.:

> "Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier."

This quotation from the regulations of the Interstate Commerce Commission and the Commission's Conference Ruling No. 207 requiring freight charges to be paid in money ought to be sufficient to convince any court that the plaintiff was guilty of acts and omissions sufficient to relieve the defendant from liability for non-payment of checks received by the plaintiff two years, five months and fourteen days before giving notice to defendant that checks received had not been paid, or for awaiting one year, three months and three days after said checks had been given to make any claim whatsoever on defendant for payment of freight charges.

Plaintiff, in its brief, quotes from cases having no bearing on the issues involved and contends that the cases cited by the courts of Louisiana in their turn have no bearing on the issues involved.

With the view of clearing up the matter, let us take the case of *Fullerton Lumber Company* v. *Chicago, M., St. P. & P. R. Co.*, decided February 24, 1931, by this Court, Justice Brandeis delivering the opinion for the Court, without any dissent from any of the other Judges.

In that case the Railroad Company was seeking to recover from the Fullerton Lumber Company on a check given to the Railroad Company by the Fullerton Lumber Company in payment of freight charges on a carload of coal shipped to it.

The facts were that the carrier had, as customary, accepted the defendant's check on a local Bank for the amount of the charges; that it had delayed presenting the check for payment, and that meanwhile the Bank had failed. The defendant contended that it was relieved from liability because of the carrier's delay in presenting the check. The trial court ruled that the Interstate Commerce Act required that a carrier's charges be paid strictly in currency; and that since the check had not been paid, the defendant was liable even if the carrier's failure to receive the money was due wholly to its own negligence.

The judgment entered for the carrier was affirmed by the Circuit Court of Appeals, but this Court—the United States Supreme Court—granted a writ of certiorari, 281 U. S. 709, 50 S. Ct. 249, 74 L., and on trial of the writ, this Court held that the provisions of the Interstate Commerce Commission were intended to prevent discrimination and rebates and to insure observance of the tariff rates and that there was no reason for denying to the parties the convenience and safety incident to making payment by means of a check payable on demand, drawn on a going Bank, etc. This Court, in that case, in reversing both the District Court and the Circuit Court of Appeals, declared:

> "Whether, in the case at Bar, the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of Law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us."

Judgment reversed. See *Fullerton Lumber Company* v. *Chicago M., St. P. & P. R. Co.*, 282 U. S. 520, 51 Sup. Ct. 227.

It will be seen that this Court, in that case, even would not make the giver of the unpaid check responsible because of the fault and laches of the Railroad Company. If the Fullerton Lumber Company, who received the freight as owners, were not made to pay the freight bill for the coal they owned and received because the Railroad Company neglected timely to present the check to the Bank for payment, then let us see how it would affect this defendant by comparison with the *Fullerton* case.

In the instant case the defendant was not the owner, nor had he any interest in the cabbage that was shipped, nor did he give any dishonored check.

That the defendant was not the owner of the cabbage that was shipped seems to be admitted even in plaintiff's petition, as we find in the petition, at page 3, as the question presented to the Court is one "involving rights and duties of the consignor and common carrier of interstate shipments of goods under contracts of shipment which require the RESPONDENT (CONSIGNOR) ALTHOUGH KNOWN NOT TO BE THE OWNER OF THE GOODS TO PAY THE LAWFUL ESTABLISHED CHARGES FOR TRANSPORTATION".

As heretofore stated, the plaintiff having alleged defendant to be the shipper, and the defendant having in his answer denied this allegation, it was incumbent upon the plaintiff to prove the disputed fact.

This we say plaintiff failed to do in submitting its case "on the pleadings".

The plaintiff would have defendant pay because the Railroad Company had him sign the bill of lading knowing that he was not the owner nor the shipper.

If the contention of plaintiff be correct, then we have to overcome the statement of the trial Judge that it would be unjust and unconscionable to hold the defendant was not discharged from liability under the facts of the instant case.

II.

The bills of lading are the sole evidence of the agreement of the parties.

We agree that bills of lading are written contracts and that their terms cannot be altered or varied by parole evidence, save and except where fraud or error induced by the agents of the plaintiff or by agreement in writing. We respectfully contend that the evidence offered at the trial shows that the agent of the Railroad Company that issued the bill of lading knew that the defendant herein was not the owner of the cabbage or real consignor thereof and that he was acting solely and only for the consignee. See printed Transcript of Record, Page 18.

As to whether the District Judge was correct in admitting oral evidence under the pleadings boots no argument for the plaintiff, when the order on which the cabbage was delivered to Tom Ayoob with the understanding that the freight was to be paid before taking the freight was in writing and even according to plaintiff's brief at page 7, the charges for freight are matters carrier and shipper are left free to contract subject to the rule which prohibits discrimination.

The Golden Rule for carriers is set forth by Justice Clarke in the case of the *Chicago and E. I. R. Co.* v. *Collins Produce Company,* 249 U. S. 186, 39 Sup. Ct. Rep. 189, as follows:

> "The relation of carrier to shipper so partakes of a fiduciary capacity as to require the utmost fairness on its part in dealing with the shipper and in the discharge of its duties to him; and the reason for this trust and confidence which must be sustained is based upon commercial necessity and public policy. Chicago & E. I. R. Co. *v.* Collins Produce Co., 249 U. S. 186, 39 Sup. Ct. Rep. 189."

Does the plaintiff meet these requirements under the evidence of this case as shown by the record? Can it be said

that the plaintiff could accept the checks of Tom Ayoob Company on the order permitting the delivery to Tom Ayoob Company only on payment of the freight and then two years or more thereafterwards attempt to collect the freight from the defendant without even showing that it made an honest effort to collect from Tom Ayoob Company on the unpaid checks?

Certainly, no one could contend that the Railroad Company could collect both from the consignor and consignee. Having collected from a party who was authorized by the consignee to accept the freight on the payment of the charges, even a consignor would be relieved from all liability by any fair construction of the bill of lading issued and forming a part of the record in this case.

It must be borne in mind that the bill of lading was never taken up by the Railroad Company, but that a delivery of the freight was made exclusively and only on an order of Sackenreuther authorizing the delivery of the freight to Tom Ayoob Company or bearer on payment of the freight charges.

The plaintiff, in its brief, endeavors to make it appear that it is entitled to collect from this defendant regardless of the fact that the freight charges were paid by Tom Ayoob Company by check.

They say in their brief, "nor could any act of omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

They quote for authority the case of *L. & N. R. Co.* v. *Central Iron & Coal Company*, 265 U. S. 59, 67, but they entirely overlooked the later case of *Fullerton Lumber Company* v. *Chicago M. St. P. & P. R. Co.*, reported in 282 U. S. 520, 51 Sup. Ct. 227, in which this Court says:

> "Carrier accepting check for freight charges held not relieved from loss resulting from delay in present-

> ing check, by general requirement that carrier charges must be paid in money."

It must further be remembered that this same *L. & N. R. Co.* v. *Central Iron & Coal Company* is cited in plaintiff's brief to the effect that the tariff need not provide when or by whom the payment should be made, and that these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. If the *L. & N. R. Co.* v. *Central Iron & Coal Company* is correct on this point, then and in that event we say that the written order on which the Railroad Company delivered the cabbage is binding on the Railroad and that it permitted the delivery of the freight solely and only after payment of the freight charges.

Our contention on this point is that this order is the same provision placed in the bill of lading and mentioned on pages 8 and 9 of plaintiff's brief, which prohibits the carrier from making delivery of shipment without payment of freight and other lawful charges.

We further say that the freight bill offered in evidence, despite all that has been said about Section 7 and other conditions, has printed as some of its conditions on the back thereof and after the numeral 7, the words:

> "Section 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but excepting those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid."

The plain English of this means that the bill of lading, without having to be signed in two different places, and which defendant in his answer called a "trick" bill of lading, requires the owner or consignee shall pay the freight and other lawful charges accruing on the property.

The defendant was neither the owner nor the consignee.

The bill of lading further declared that the carrier should not deliver possession at destination of the property covered by the bill of lading until all tariff rates and charges thereon have been paid except in those instances where it was lawfully authorized to do so. These provisions mean only one thing, and that is that the order of Sackenreuther, the owner, and the consignee, authorized the delivery of the freight to the Tom Ayoob Company.

The other part of Section 7 simply means that the consignor, unless he signed on the face of the bill of lading under the wording that the "carrier shall not make delivery of this shipment without payment of freight and all other lawful charges," that if the Railroad Company was unable to collect from the consignee, then and in that event the consignor would be responsible to the Railroad Company.

We do not dispute that the shipper of goods is primarily responsible for freight charges, but we contend that the word "primarily" shows that there are others responsible for the freight charges and that when the Railroad Company either collects or seeks to collect by taking bad checks or other things of no value from the consignee or owner, that they do so at the risk of being held guilty like other people for their neglect, laches and wrongdoing.

The contention in Plaintiff's brief that an interstate carrier cannot estop itself from enforcing payment from one who has assumed liability for transportation charges, becomes ridiculous when we consider that the bill of lading shows that the shipment was not prepaid, but that collection was to be made on delivery.

The regulations of the Interstate Commerce Commission on payment of rates and charges, 171 I. C. C. 268, makes the situation very clear when it says:

> "The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges

within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth."

The wording of the above plainly means that the Railroad should have taken necessary "precaution" to assure payment of freight charges even if the order to deliver the goods to Tom Ayoob Company did not require payment of freight charges as a prerequisite to delivery of the cabbage.

The above rule further made Tom Ayoob Company the shipper insofar as collection of freight charges are concerned. The rule says:

"* * * those who undertake to pay such charges, such persons herein being called shippers * * *"

III.

Do cases cited by the Court of Appeal of Louisiana fail to support its decision.

The plaintiff, in its brief, set up that the Central Iron & Coal Company case does not support the State decisions because there was no clause by which the shipper agrees expressly to pay the freight charges or to guarantee their payment.

This statement does not track with the plaintiff's quotation from that case on page seven of their brief under the heading, "The Consignor is primarily liable for the freight charges".

We understand the Central Iron & Coal Company case to be a ruling of this Court that ordinarily, "the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is

ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee, for the shipper is presumably the consignor; the transportation ordered by him is presumably in his own behalf and on promise by him to pay therefor is inferred."

The facts of this case present an entirely different situation. In the instant case the defendant was not the owner and should not have been named as consignor in the bill of lading as he was acting for the consignee and all to the knowledge of the Railroad Company receiving the shipment. Further than this, the plaintiff in this case delivered the freight not to the consignee or owner, but to a third party on a written order of the consignee, who, while not primarily responsible for the freight, was required to pay the freight because the shipment was not prepaid. The delivery of the freight on the payment of the freight charges by this third party by checks certainly relieved the defendant of any liability in the premises; but even if the defendant was not relieved by the plaintiff accepting checks of the third party, this defendant was relieved by the laches and negligence of the plaintiff in not giving timely notice of the non-payment of the checks taken in payment of the freight.

In other words, even if this defendant had been the owner and the consignor, and which facts are denied, the defendant under the ruling of this Court in the Fullerton case, is absolved of all liability in the premises.

This Court said in *Fullerton Lumber Company* v. *Chicago, M. St. P. & P. R. R. Co.*, that

> "Carrier accepting check for freight charges held not relieved from loss, resulting from delay in presenting check, by general requirement that carrier's charges must be paid in money."

Now, as to whether the facts of this case disclose or involve an action or controversy properly within the jurisdiction of this Court, we beg to submit this quotation from *Southwestern Bell Telephone Company* v. *State of Oklahoma, et al.,* 303 U. S. 206, in which this Court says:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

The numerous citations of law in the *Telephone Company* case need not be here repeated.

In the case now before the Court on this application for Writs of Certiorari, it does not appear affirmatively from the record that a Federal question was presented for decision to the highest court of the State having jurisdiction, nor does it appear from the record that the decisions of the courts of Louisiana of a Federal question was necessary to the determination of the cause, or that the judgment of the courts of the State of Louisiana could not have been given without deciding a Federal question.

It is respectfully submitted that the Writ of Certiorari prayed for should not be issued.

PIERRE MISTROT,
By WADE O. MARTIN, JR.,
L. AUSTIN FONTENOT.